IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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NO. 81-

JOHNNY LEE GATES,

Petitioner,

v.

WALTER ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF FOR THE RESPONDENT IN OPPOSITION

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The Respondent in the above-styled action, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the order of the Superior Court of Butts County, Georgia denying Petitioner's petition for a writ of habeas corpus. This order is contained in Appendix B of the petition.

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QUESTIONS PRESENTED

1.

Were the Petitioner's constitutional rights violated by the imposition of the death penalty in the instant case?

2.

Was Petitioner as an indigent death row inmate in a state habeas corpus proceeding denied constitutional rights by the requirement under Ga. Code Ann. §38-801(d) requiring the tendered of attendance and mileage fees with a witness subpoena?

PART ONE

STATEMENT OF THE CASE

Johnny Lee Gates, the Petitioner, was indicted in Muscogee County during November, 1976 for the rape, armed robbery and murder of Katrina G. Wright. (R. 3-8). Following a jury trial, Appellant was found guilty on all counts and sentenced to death for the murder and twenty years each for rape and armed robbery. (R. 31-34). Motion for New Trial was denied and a Notice of Appeal was filed April 19, 1979. (R. 48). The Georgia Supreme Court affirmed the convictions and sentence including the death sentence in Gates v. State, 244 Ga. 586 (1979). Certiorari was denied March 17, 1980 by this Court in Gates v. Georgia, ___ U.S. ___ (1980)(No. 79-5959). The Petitioner thereafter filed a petition for writ of habeas corpus which was denied on January 16, 1981. Thereafter the Georgia Supreme Court denied the Petitioner's timely application for probable cause to appeal.

Ms. Katrina G. Wright, a German woman, moved to the United States with her husband, one month prior to her murder. (T. 240). Gregory Wright, a serviceman in the Army, had been stationed at Fort Benning only twelve days before the crimes occurred. (T. 240, 241).

At approximately 1:00 P.M. on the afternoon of Tuesday, November 30, 1976, Petitioner went to the apartment of Katrina and Gregory Wright at 7030 Broadway, Fountain Court Apartments. (T. 242, 309, 399). Petitioner posed as an employee from the gas company in order to scan the apartment for a robbery. (T. 399, 400). As a coincidence, Katrina had called the gas company earlier for service and knowingly let Appellant into her apartment. (T. 399). Katrina gave Petitioner a can of oil to fix the fan on the heater. (T. 400). Petitioner pretended to oil the heater then informed Katrina he was there to rob her. (T. 400).

Petitioner admitted in a confession that he gagged and tied up Katrina's hands and face with neckties and bathrobe belt. (T. 400). Petitioner then raped Katrina and robbed her of $500.00 cash. (T. 400). Petitioner stated that he carried a gun. (T. 399, 400). After the rape and robbery, Petitioner started to leave and Katrina said she would identify him. (T. 400). Petitioner became frightened. Petitioner stated, "I was walking past her, so I shot her in the right side of the head." (T. 400). Petitioner ran out of the apartment and returned the .32 caliber pistol to his friend, James Taylor. (T. 399, 401). Petitioner admitted that he borrowed the gun from Taylor in order to commit robberies. (T. 399).

Gregory Wright arrived home at 1:24 P.M. and found his wife lying on the floor with a gunshot wound in her head. (T. 246, 253). Black neckties were tied around Katrina's mouth, her face and nose, and her eyes. (T. 246). Katrina was lying face up with her hands tied behind her back very tightly with a belt. (T. 246, 247, 252). Blood surrounded the victim's head. (T. 246, 247). The contents of Katrina's purse had been poured out and her panties were hanging on a cord. (T. 246, 247, 253). The sheets were pulled from the mattress and $480.00 of cash, which had been hidden in the mattress, was missing. (T. 245, 247). Wright ran to a nearby pay telephone and called the police. (T. 247, 248).

Officers George Keller, Peter Quasda and Carolyn Hall of the Columbus Police Department, responded to the call. They also observed Katrina bound with neckties and a bullet wound in her head. (T. 256-262, 272-279). Some areas were dusted for fingerprints, however none significant were found at that time. (T. 260, 264, 266).

On January 30, 1977, Petitioner confessed to the killing of another girl and was then questioned about Katrina. (T. 377, 338). Petitioner made an oral and written statement as to the robbery, rape and murder of Katrina. (T. 338-344, 394, 395). Officers Ronald Lynn and C. E. Hillhouse interviewed Petitioner. (T. 392, 399, 400). Lynn and Hillhouse testified that Petitioner was given his Miranda rights before he signed a waiver and confession. (T. 342, 386, 393).

On the afternoon of January 31, Petitioner was taken back to the scene of the crime, where he explained to officers his actions in the crimes. (T. 353, 415). Petitioner was again advised of his rights and the confession was videotaped by Officer Ronald Lowrance. That same afternoon Officer Eddie Florence found Petitioner's fingerprints located on the cover of the heater in a closet at the Wright's apartment. (T. 436-438, 454, 460). The fingerprints were still remaining as a result of the oil from the fingerprints crystalizing on the heater. (T. 456). The court ruled Petitioner's written and videotaped statements to be admissible. The statements were made freely and voluntarily with complete understanding by Petitioner. (T. 379-383).

On the witness stand, Petitioner stated that he was threatened and refused an attorney. (T. 369, 371, 374). Officers Hillhouse and Lynn testified that no threats or promises were made and that Petitioner did not request an attorney. (T. 376, 377, 397). Petitioner said in his statement that Katrina offered him sex instead of money and that she gave Petitioner money when he pulled out his gun. (T. 400). Petitioner stated Katrina gave him $200.00 from the stereo player. (T. 400). Gregory testified that all of the cash was hidden under the bed. (T. 255).

Donald L. Hudgins, a tenant in Fountain Court Apartments, testified that at approximately 12:00 noon on the day of the murder, Petitioner came to his door, posing as a gas company employee. (T. 309-311). Petitioner did not enter Hudgins' apartment, but turned away and went to Wright's apartment. (T. 311). Hudgins later identified Petitioner in a police line-up. (T. 313-316, 331). Petitioner stated to Officer Hillhouse that Hudgins was the man he approached before going to the Wright's apartment. (T. 330, 385).

Dr. Miki Suma, gynecologist, examined Katrina prior to autopsy. (T. 292, 295). Dr. Suma testified that motile sperm was found in the victim's vagina and cervix indicating recent sexual intercourse. (T. 296, 298). Approximately six lacerations found in the vaginal area indicated forced sexual intercourse. (T. 299, 300).

Dr. Joe M. Webber, County Medical Examiner performed an autopsy on the victim. (T. 283, 284). Dr. Webber found a gunshot wound in the right temple which extended to the brain stem. (T. 285). A bullet lodged in the skull was recovered. (T. 287).

REASONS FOR NOT GRANTING THE WRIT

A. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE IN THE INSTANT CASE.

This Court has upheld the constitutionality of Georgia's death penalty statute. Gregg v. Georgia, 428 U.S. 153 (1976). It is undisputed that the jury found three aggravating circumstances in the instant case. These aggravating circumstances were (1) that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery; (2) the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: rape; and (3) that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim. (T. 614).

The Georgia Supreme Court found that the trial court erroneously applied the aggravating circumstances of "depravity of mind to the victim" but upheld the death sentence as the jury had found the other two remaining aggravating circumstances.

The trial court during the sentencing phase of the trial had instructed the jury in part as follows:

> "Now, ladies and gentlemen, you may consider one or all three of those aggravating circumstances if you find beyond a reasonable doubt they do exist." (T. 609).

In the instant petition, the Petitioner relies upon the case of Stromberg v. California, 283 U.S. 359 (1931). The Petitioner's argument under Stromberg is that if a jury has been instructed to consider several possible grounds for a verdict and one of these grounds are unconstitutional, the verdict should be set aside if the finding of the jury could have been based upon the unconstitutional and constitutional grounds.

In the instant case, the Stromberg analysis should not be used in that the factual patterns are distinct. In the instant case, there were instructions to the jury that the finding of one aggravating circumstance was sufficient for the infliction of the death penalty. (T. 609). As such, the record below shows that once the first aggravating circumstance was found by the jury, the jury was entitled to recommend the death penalty.

Further, it is apparent that the inclusion of this erroneous aggravating circumstance could not have harmed the Petitioner at all. Indeed, it is clear that by focusing on the victim, the trial court in effect made it more difficult for the jury to recommend the death penalty.

Therefore, given the undisputed existence of two aggravating circumstances found by the jury to exist beyond a reasonable doubt, the Petitioner's allegations that the imposition of his death penalty is unconstitutional are without merit.

B. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT DENIED BY THE REQUIREMENTS UNDER GA. CODE ANN. §38-801(d) REQUIRING THE TENDER OF WITNESS AND MILEAGE FEES WITH A WITNESS SUBPOENA.

Under the Sixth Amendment to the United States Constitution an individual has the right to compulsory process to obtain the testimony of his own witnesses in a criminal trial. However, this constitutional provision is limited to application in criminal proceedings, and there is no specific corresponding constitutional requirement for compulsory process for witnesses in civil proceedings. It has long and consistently been recognized in Georgia that habeas corpus is not a criminal proceeding. Coker v. Smith, 225 Ga. 529 (1969); Krist v. Caldwell, 230 Ga. 536 (7)(1973).

Further, the Petitioner had access under Georgia law to alternative methods of producing evidence before the court such as oral testimony, and sworn affidavits. As such, the Petitioner's constitutional right to due process has not been violated.

Also, it is apparent from the petition that the Petitioner has not shown that he was in any way harmed by the restrictions of Ga. Code Ann. § 38-801(d).

Therefore, the Petitioner's allegations in this regard are without merit.

CONCLUSION

For all of the foregoing reasons, this Court should decline to grant the petition for writ of certiorari filed by Johnny Lee Gates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William Davis Hewitt, Attorney of Record for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of the foregoing Brief for Respondent in Opposition upon the Petitioner by depositing this day a copy of same in the United States Mail, with proper address and adequate postage thereon to:

Ronnie K. Batchelor, Esq.
4179 Memorial Drive
Decatur, Georgia 30032

This 8 day of October, 1981.

WILLIAM DAVIS HEWITT